APPEAL NO. 172868
FILED MARCH 7, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on October 23, 2017, with the record closing on November 10, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to lumbar radiculopathy, disc protrusions at L3 through S1, nerve root encroachment at L4-5, left foot drop, atrophy of the left lower extremity, and L3 disc disruption, but does not extend to multiple level lumbar degenerative disc disease or lumbar spondylosis; (2) the respondent/cross-appellant (claimant) has not reached maximum medical improvement (MMI); and (3) because the claimant has not reached MMI, an impairment rating (IR) cannot be assigned.

The appellant/cross-respondent (carrier) appealed the ALJ's determinations regarding extent of the injury to include lumbar radiculopathy, disc protrusions at L3 through S1, nerve root encroachment at L4-5, left foot drop, atrophy of the left lower extremity, and L3 disc disruption as being contrary to the great weight of the evidence and further argued that the ALJ erred in finding that the claimant had not reached MMI when the parties stipulated that the claimant reached statutory MMI on September 21, 2017.

The claimant responded, urging affirmance of the ALJ's extent-of-injury determinations and requesting that the issues of MMI and IR be remanded to the ALJ for resolution.

The ALJ's determination that the compensable injury of (date of injury), does not extend to multiple level lumbar degenerative disc disease or lumbar spondylosis was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she sustained an injury on (date of injury), when she tripped while ascending a staircase and fell forward, falling onto her knees on the staircase landing. The parties stipulated, in part, that the carrier accepted as compensable a lumbar sprain.

EXTENT OF INJURY

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

The ALJ's determination that the compensable injury of (date of injury), extends to lumbar radiculopathy, disc protrusions at L3 through S1, nerve root encroachment at L4-5, left foot drop, atrophy of the left lower extremity, and L3 disc disruption is supported by sufficient evidence and is affirmed. The fact that another fact finder may have drawn different inferences from the evidence which would have supported a different result does not provide a basis for us to disturb the challenged determination. *Salazar v. Hill*, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi, 1977, writ ref'd n.r.e.).

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Among the issues certified at the benefit review conference for resolution and as stated in the ALJ's decision are:

2. Has the [c]laimant reached [MMI], and if so, on what date?

3. If the [c]laimant has reached MMI, what is the [IR]?

In her decision signed November 10, 2017, the ALJ determined that the claimant had not reached MMI, as certified by the designated doctor, (Dr. H) in his Report of Medical Evaluation (DWC-69) dated May 16, 2017. The ALJ further determined that because the claimant has not reached MMI, an IR cannot be assigned.

Based upon the parties' stipulation that the date of statutory MMI is September 21, 2017, it is undisputed that the claimant had, in fact, attained MMI prior to the October 23, 2017, date of the CCH and the November 10, 2017, date of the ALJ's Decision and Order. The Appeals Panel has previously held that it is legal error to determine a claimant has not reached MMI in a Decision and Order dated after the date of statutory MMI. *See* Appeals Panel Decision (APD) 131554, decided September 3, 2013. We accordingly, find the ALJ's failure to determine the claimant's date of MMI and IR, when it was undisputed that the claimant had reached statutory MMI prior to the date of the CCH and Decision and Order, to be legal error. We reverse the ALJ's determinations that the claimant has not reached MMI and that an IR cannot be assigned because the date of MMI has not been determined.

There are three other certifications of MMI/IR in evidence. The first is from Dr. H, the designated doctor, who initially examined the claimant on October 21, 2016, and in a DWC-69 signed on the date of the examination, certified that, with regard to the accepted lumbar sprain only, the claimant reached clinical MMI on September 16, 2015, with a zero percent IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). As previously discussed, the ALJ's determination that the compensable injury extends to lumbar radiculopathy, disc protrusions at L3 through S1, nerve root encroachment at L4-5, left foot drop, atrophy of the left lower extremity, and L3 disc disruption has been affirmed. In his certification and report of October 21, 2016, Dr. H rated only the accepted lumbar sprain and did not consider the additional conditions found by the ALJ to be compensable. Dr. H did not consider and rate the entire compensable injury and, consequently, his MMI/IR certification of October 21, 2016, cannot be adopted. *See* APD 110267, decided April 19, 2011, and APD 043168, decided January 20, 2005.

The remaining MMI/IR certifications in evidence are from (Dr. O), the carrier's choice of physician, and (Dr. J), a referral of the treating doctor. Both Dr. O and Dr. J certified that the claimant had not reached MMI and neither certification can be adopted because the claimant's statutory MMI date of September 21, 2017, has passed. *See* APD 171028, decided July 6, 2017.

Because there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury extends to lumbar radiculopathy, disc protrusions at L3 through S1, nerve root encroachment at L4-5, left foot drop, atrophy of the left lower extremity, and L3 disc disruption.

We reverse the ALJ's determinations that the claimant has not reached MMI and that the claimant's IR cannot be determined, and we remand the issues of MMI/IR to the ALJ for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand, the ALJ is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the (date of injury), compensable injury extends to a lumbar sprain, lumbar radiculopathy, disc protrusions at L3 through S1, nerve root encroachment at L4-5, left foot drop, atrophy of the left lower extremity, and L3 disc disruption. The ALJ is also to advise the designated doctor that the compensable injury does not extend to multiple level lumbar degenerative disc disease or lumbar spondylosis.

The ALJ is to further advise the designated doctor that the statutory date of MMI as stipulated to by the parties is September 21, 2017, and that the MMI date certified can be no later than the September 21, 2017, statutory date of MMI. The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). The parties are to be allowed an opportunity to respond. The ALJ is to determine the issues of MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is

received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge